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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; KNIGHT CAPITAL AMERICAS L.P., FORMERLY KNOWN AS KNIGHT EQUITY MARKETS L.P.; UBS SECURITIES LLC; E*TRADE CAPITAL MARKETS LLC; NATIONAL FINANCIAL SERVICES LLC; AND CITADEL DERIVATIVES GROUP LLC, PETITIONERS

v.

GREG MANNING; CLAES ARNUP; POSILJONEN AB; POSILJONEN AS, SVEABORG HANDEL AS; FLYGEXPO AB; AND LONDRINA HOLDING LTD.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Interstate Natural Gas Association of America ("INGAA") is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents the vast majority of interstate natural gas transportation pipeline companies operating in the United States, as well as comparable companies in Canada. Its members transport much of the nation's natural gas through a network of 200,000 miles of pipelines and also operate many interstate natural gas storage facilities. INGAA's members are regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act. INGAA and its individual members have a substantial interest in contract stability, rate certainty, continued investment in energy infrastructure, and ensuring predictable, consistent, rational, and fair law and policy affecting natural gas transportation. To advance those interests, INGAA regularly participates as an *amicus* in cases concerning the proper regulation of the industry. See, e.g., *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527 (2008).[2]

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[1] No counsel for a party has authored this brief in whole or part, and no person or entity other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. A blanket consent letter on behalf of all parties is on file with the Court.

[2] This brief represents the position of INGAA but not necessarily the views of any particular member with respect to any issue.

SUMMARY OF ARGUMENT

The decision of the court of appeals in this matter hinges, in part, on construction of the exclusive jurisdiction provision of the Securities Exchange Act (Section 27) and on this Court's holding in *Pan American Petroleum Corp. v. Superior Court of Delaware in and for New Castle County*, 366 U.S. 656 (1961), in which the Court discussed the substantially identical exclusive jurisdiction provision of the Natural Gas Act.[3] As a representative of the vast majority of interstate natural gas transporters operating in the United States, INGAA has a significant interest in this Court's construction of the Natural Gas Act and comparable language in the Securities Exchange Act.

To the extent the Court addresses whether Section 27 of the Securities Exchange Act creates an independent basis for federal jurisdiction, INGAA urges the Court to hold that it does. Claims to enforce rights or duties created by the Natural Gas Act or rules and regulations thereunder, including FERC orders and FERC-approved tariffs, are subject to the Natural Gas Act's exclusive jurisdiction provision and must be brought in federal court, regardless of whether they would otherwise withstand "arising under" scrutiny.[4]

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[3] At the time *Pan American* was decided, this provision was Section 22 of the Natural Gas Act; it is now Section 24.

[4] For the sake of brevity, and to avoid repetition, the term "FERC-approved tariffs" when used by itself includes tariffs in the strict sense, as well as other orders and directives issued by FERC.

The Natural Gas Act is a comprehensive, nationwide regulatory scheme governing interstate gas transportation. Within that scheme, interstate gas pipelines must file and abide by tariffs that are approved by FERC. These tariffs carry the weight of federal regulation and federal law. Crucial to the effectiveness of this comprehensive scheme—and the tariffs promulgated thereunder—is the concept of predictable and uniform enforcement and interpretation of tariffs and orders by the federal courts.

This notion is codified in Section 24 of the Natural Gas Act, which states federal courts "shall have exclusive jurisdiction" over both (a) all violations of the Natural Gas Act and the "rules, regulations and orders" under the Act, and (b) "all suits" and "actions" brought to "enforce any liability or duty" created by the Natural Gas Act and "any rule, regulation or order thereunder." 15 U.S.C. § 717u. Congress, therefore, unambiguously provided for exclusive federal jurisdiction in this small class of cases and claims.

In holding Section 27 of the Securities Exchange Act does not constitute a grant of jurisdiction, the court of appeals primarily relies on its interpretation of this Court's holding in *Pan American*, which discussed what is now Section 24 of the Natural Gas Act. The court of appeals' analysis, however, is flawed. In *Pan American*, the Court did not specifically address the types of claims that do enjoy exclusive federal jurisdiction under Section 24 of the Natural Gas Act. Rather, the Court simply found the claims asserted in that case did not fit within that

class and that anticipated defenses did not affect the well-pleaded complaint.

By the plain language of Section 24, Congress envisioned a narrow set of cases and claims exclusively within the expertise of the federal courts. These include claims nominally asserted under state law when they involve orders issued by FERC, alleged violations of the Natural Gas Act or FERC-approved tariffs, or duties and liabilities arising from the Natural Gas Act and FERC-approved tariffs. To hold otherwise renders Section 24 meaningless.

Contrary to the court of appeals' interpretation, *Pan American* does not hold Section 24 never confers jurisdiction. The facts and claims involved in *Pan American* simply did not implicate the violation or enforcement of the Natural Gas Act, a FERC-approved tariff, or any other "duty," "liability," "rule," or "regulation" under the Natural Gas Act. As such, to the extent the Court addresses its holding in *Pan American*, INGAA urges it to confirm federal courts have exclusive jurisdiction to hear all claims involving the enforcement of rights and duties arising under the Natural Gas Act and FERC-approved tariffs.

Further, *Pan American* did not address the precise question presented in this case—whether an exclusive jurisdiction provision confers exclusive jurisdiction when the claims alleged necessarily involve enforcement of "duties" or "liabilities" created by the federal statutory scheme or the regulations promulgated thereunder. In order to provide the predictability and certainty that Congress intended

for a nationwide scheme, such claims must be brought in federal court. In particular, claims by and against interstate pipelines that fit within this class must be brought and heard in federal court and not state court.

ARGUMENT

I. Congress enacted the Natural Gas Act to provide a comprehensive, nationwide regulatory scheme for the transportation of natural gas.

The Natural Gas Act, 15 U.S.C. §§ 717–717z, establishes a "comprehensive scheme of federal regulation" that vests the FERC with "exclusive jurisdiction over the transportation . . . of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988). Interstate gas pipelines, therefore, are subject to the Natural Gas Act and are regulated by FERC.[5]

Congress enacted the Natural Gas Act in 1938 in order to assert federal control over interstate natural gas transmission. Gas transportation had become an increasingly interstate industry and, as the volume of gas sold and transported along interstate pipelines increased in the United States, Congress regarded state regulations as ineffective. See *Panhandle E. Pipe Line Co. v. Pub. Serv.*

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[5] Section 1(b) of the Natural Gas Act extends federal jurisdiction over interstate transportation of natural gas, as well as the companies engaged in such transportation. 15 U.S.C. § 717(b).

Comm'n of Ind., 332 U.S. 507, 515 (1947). The Natural Gas Act was a response to demand for federal regulation and for Congress to curb the market power of interstate pipelines. *Id.* at 516. The Natural Gas Act was intended to provide necessary uniformity and predictability through national regulation of interstate gas transportation. See, e.g., 15 U.S.C. § 717(a) ("Federal regulation in matters relating to the transportation of natural gas . . . in interstate and foreign commerce is necessary in the public interest."). Congress intended to create a "comprehensive and effective regulatory scheme" over interstate gas transportation. *Panhandle*, 332 U.S. at 520; *accord Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). The scheme removed interstate transportation from state regulation, substituting a federal regulatory regime in its place.

FERC is the agency charged with the administration of the Natural Gas Act, and its jurisdiction is laid out in § 1(b). FERC has jurisdiction over matters relating to the transportation of natural gas in interstate commerce. *Schneidewind*, 485 U.S. at 295, 301, 305. Where Congress has granted FERC jurisdiction, "that jurisdiction is exclusive." *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1076 (S.D. Cal. 2003); *accord Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring) ("[I]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."). Sections 4 and 5 of the Natural Gas Act govern FERC's superintendence of rates for interstate gas

transmission. Section 5 empowers FERC with oversight over "any rule, regulation, practice or contract affecting" the rates charged for interstate transportation. 15 U.S.C. § 717(d).

States, therefore, cannot regulate the rates charged by interstate gas transporters; this is the domain of FERC. Further, pursuant to the Natural Gas Act, interstate transporters must file and adhere to tariffs, which must be approved by FERC.

As time passed, pipelines shifted away from bundled services with the FERC's encouragement. In 1992, FERC Order No. 636 required such unbundling. The interstate gas pipelines are now required to provide open and equal access to all shippers. The importance of a uniform and consistent body of law has become apparent as this regulatory regime developed. In particular, a consistent body of law regarding enforcement of orders, "duties," and "liabilities" under the Natural Gas Act and FERC-approved tariffs is crucial.

A. The regulatory framework for interstate gas transportation is driven by FERC-approved tariffs, which carry the force of federal law.

Under § 4 of the Natural Gas Act, interstate gas pipelines must file with FERC all rates and any changes they propose in their rates. The rates a regulated gas company files with FERC are lawful only if they are "just and reasonable." 15 U.S.C. § 717c(a); see also *Ark. La. Gas v. Hall*, 453 U.S. 571, 577 (1981).

The filed tariff is the seminal document that controls the rates charged and services provided by interstate gas pipelines.[6] An interstate gas pipeline's rate schedules, together with the forms it uses for its service agreements with customers, constitute its tariff. 18 C.F.R. § 154.3. No pipeline may charge its customers more than the rates FERC has permitted to take effect and that appear in the tariff. *Id.* § 154.3(a). A typical tariff also contains "general terms and conditions" that include provisions governing gas quality, terms for billing and payment, and other matters related to transportation.

A filed tariff is the equivalent of a federal regulation and, therefore, is federal law. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939).[7] As such, there is a need for uniform and consistent enforcement of the duties and liabilities arising from and through FERC-approved tariffs.

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[6] See, e.g., Gas Transmission Northwest Corporation's Third Revised Volume No. 1-A tariff, on file and publicly available through FERC's online database: https://www.ferc.gov/industries/gas/gen-info/fastr/htmlall/014333_000100/014333_000100__contents.htm.

[7] Various circuit courts uniformly recognize this concept. See *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998); *W. Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *Carter v. AT&T Co.*, 365 F.2d 486, 496 (5th Cir. 1966).

B. The Natural Gas Act provides for exclusive jurisdiction in federal courts of claims involving rights and duties under the Natural Gas Act, FERC orders, and FERC-approved tariffs.

Given that interstate gas transportation is federally regulated, it is not surprising that Congress provided for exclusive federal jurisdiction in that class of cases in which violations of the Natural Gas Act, FERC orders and FERC-approved tariffs are alleged, as well as "all suits in equity and actions at law" to enforce any "liability or duty" arising from any rule, regulation, or order under the Natural Gas Act. Again, FERC-approved tariffs are federal regulations promulgated pursuant to the Natural Gas Act.

Section 24 of the Natural Gas Act provides, in relevant part:

> "District Courts of the United States . . . ***shall have exclusive jurisdiction*** of violations of this chapter or the rules, regulations, and orders thereunder, and of ***all suits in equity and actions at law brought to enforce any liability or duty*** created by, or to enjoin any violation of, this chapter ***or any rule, regulation, or order thereunder***."

15 U.S.C. § 717u (emphases added).

The language Congress used in Section 24 is clear and unambiguous, providing exclusive federal

jurisdiction in the small sub-class of claims and suits in which violations or enforcement of FERC orders or FERC-approved tariffs are implicated.[8] Where the will of Congress is expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Because there is a limited set of claims that would fit within Section 24, there is no need to complicate the analysis with the court of appeals' multi-faceted approach.

II. Section 24 expresses Congress' intent that only federal courts hear claims asserting violations of the Natural Gas Act and claims to enforce "liabilities" or "duties" under the Natural Gas Act, FERC orders, and FERC-approved tariffs.

FERC-issued orders and FERC-approved tariffs undeniably are issued pursuant to the Natural Gas Act. Under Section 24's plain language, therefore, any order issued by FERC and any FERC-approved tariff necessarily is included in the phrases "orders thereunder" and "rule, regulation, or order thereunder." Thus, any suit alleging a "violation of" any such order or tariff, as well as any suit to enforce a liability or duty under an order or tariff, is subject to exclusive jurisdiction in the federal courts. *Lynch*

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[8] Unlike other state law claims that may tangentially touch upon federal law, these claims directly implicate federal law. This is a necessarily limited group of claims and cases; therefore concerns over inundation of the federal courts are not applicable.

v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925) ("The plain, obvious, and rational meaning of a statute is always to be preferred . . . ."); *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 12 (1878) (holding the Court must presume lawmakers use words in "their natural and ordinary significance"). The term "regulation" used in Section 24 also undisputedly includes FERC-approved tariffs, since they carry the weight of both federal regulation and federal law.

This centralization of claims in the federal courts is critical to the national, uniform enforcement of duties and liabilities under the Natural Gas Act and, in particular, the uniform enforcement and interpretation of FERC orders and FERC-approved tariffs. This is the only reasonable interpretation of Section 24. A nationwide regulatory scheme must rely on a consistent body of federal case law enforcing the liabilities and duties created by FERC-approved tariffs. As Congress has noted, this serves the public interest.[9]

Therefore, even claims nominally asserted under state law must be filed in federal court when they implicate or require enforcement of liabilities and duties created under FERC-approved tariffs.

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[9] "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary and in the public interest." Natural Gas Act of 1937, § 1, H.R. 6586, 75th Cong. (3d Sess. 1938).

III. Section 24 should be read to grant exclusive jurisdiction in this limited set of cases and claims, as held by the Ninth Circuit.

The Court should endorse the Ninth Circuit's interpretation that exclusive jurisdiction provisions present a special category of cases and claims for exclusive federal jurisdiction. Such provisions clearly evidence Congress' intent that the federal courts have exclusive jurisdiction to resolve claims to enforce any right or obligation created by Congress in enacting a comprehensive scheme of federal regulation, such as the Natural Gas Act. While they do not create a federal cause of action, they do confer original jurisdiction upon the federal courts to hear these types of claims.

However, even if the Court determines federal courts still must perform an "arising under" analysis for such claims, INGAA urges the Court to hold that exclusive jurisdiction provisions like Section 24 broaden the scope of what constitutes "arising under" in claims to enforce rights or duties under the Natural Gas Act and FERC-approved tariffs. To continue to subject these claims to the non-industry-specific "arising under" analysis would thwart Congress' clearly expressed intent that this class of claims be resolved exclusively by the federal courts.

A. The Ninth Circuit view: Exclusive jurisdiction provisions create a special category of cases and claims because Congress carved out certain claims for federal courts' determination.

The Ninth Circuit held exclusive jurisdiction provisions like Section 24 present a special category of cases for exclusive federal jurisdiction. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 842 (9th Cir. 2004).

First, in *Sparta Surgical Corp. v. National Association of Securities Dealers*, the court held Section 27 of the Securities Exchange Act of 1934 vests exclusive jurisdiction in the federal courts to hear claims alleging violations of the rules and regulations thereunder, reasoning "[t]he rule that state law claims cannot be alchemized into federal causes of action by incidental reference . . . has no application when relief is partially predicated on a subject matter committed exclusively to federal jurisdiction." 159 F.3d 1209, 1212–13 (9th Cir. 1998).

Then, in *Dynegy*, the court held claims "to enforce obligations that squarely fall within the exclusive jurisdiction provision of the Federal Power Act" do not require the general federal question analysis. 375 F.3d at 841–43. The court explained that although California asserted claims under its own unfair competition laws, "[t]he state lawsuit turns, entirely, upon the defendant's compliance with a federal regulation," specifically, the filed tariff promulgated under the Federal Power Act. *Id.* at 841

("Absent a violation of the FERC-filed tariff, no state law liability could survive."). Because Section 317 of the Federal Power Act confers upon the federal courts exclusive jurisdiction to hear claims to enforce any liability or duty created thereunder, California's action to enforce obligations created by the tariff could be resolved only in the federal court.[10]

Only the Third Circuit, in the underlying opinion, has expressly disagreed. The Sixth Circuit's opinion in *Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583 (6th Cir. 2013), for instance, is not irreconcilable. In *Singh*, a gas pipeline company sued property owners to enjoin them from engaging in activity with respect to existing real property easements. Reversing the district court's finding of jurisdiction, the court of appeals held the pipeline's claim did not arise under the Natural Gas Act because the pipeline did not allege the Act imposed any duty on the property owners or that the property owners violated any provision of the Act or rules or regulations thereunder. *Id.* at 588. In other words, the claim did not seek to enforce rights or obligations created by the Natural Gas Act or a FERC-approved tariff and, therefore, did not trigger the Act's exclusive jurisdiction provision in the first place.

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[10] Following this logic, at least one district court held breach of contract and negligence claims that relied upon gas quality provisions from an interstate pipeline's filed tariff fell within the exclusive jurisdiction statute. *See PacifiCorp v. Northwest Pipeline GP*, No. CV. 10-99-PK, 2010 WL 3199950, at *6 (D. Or. June 23, 2010) ("[T]he plaintiff's contract and negligence causes of action turn on the meaning of provisions in the FERC-filed tariff . . . .").

Singh, however, incorrectly interpreted this Court's opinion in *Pan American* as requiring the district court to perform an "arising under" analysis before determining whether Section 24 creates exclusive jurisdiction: "In [*Pan American*] the Supreme Court clarified that § [24] does not create jurisdiction beyond standard federal 'arising under' jurisdiction. As Justice Frankfurter stated, '[e]xclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded.'" *Id.* at 591 (quoting *Pan American*, 366 U.S. at 664). *Pan American*, which pre-dated *Merrell Dow* and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), does not require an "arising under" analysis for claims to enforce rights or duties created by the Natural Gas Act and FERC-approved tariffs, but rather merely reiterates that the well-pleaded complaint rule applies universally.

B. Pan American: the well-pleaded complaint must articulate a claim to enforce rights or duties created by the Natural Gas Act or a FERC-approved tariff.

The claim at issue in this Court's opinion in *Pan American* did not implicate the Natural Gas Act or any rules or regulations thereunder. Rather, the claim at issue involved breach of a private agreement between a gas pipeline company (Cities Services) and a producer of natural gas (Pan American). *Pan Am.*, 366 U.S. at 658.

The parties' gas purchase contract had a fixed price, but the Kansas Corporation Commission subsequently promulgated an order fixing a minimum price higher than the rate set forth in the contract. *Id.* Cities Services advised Pan American by letter that to avoid penalties, it would pay the higher rate while it contested the validity of the Kansas order, but that it preserved its rights to seek recovery of the difference between the contract price and the amount paid, and that it expected Pan American to refund the overpayment if the order was invalidated. *Id.* at 658–59. Each payment check Cities Services sent to Pan American had a notation stating the payment was subject to the reservations set forth in the letter. *Id.* at 659. Pan American responded that it would accept the payments subject to Cities Services' demand for a refund for overpayment if the minimum-rate order was invalidated. *Id.* When the Court subsequently determined the Kansas Corporation Commission's minimum-rate order was invalid, Pan American refused to refund the overpayments, and Cities Services sued in the state court for Pan American's breach of the agreement to refund the overpayment, not for breach of any obligation under the Natural Gas Act or Pan American's tariff. *Id.* at 660–61.

Like *Singh*, therefore, *Pan American* did not involve a claim to enforce rights or obligations created by the Natural Gas Act or Cities Services' FERC-approved tariff. The Court noted it was "not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private rights here in controversy," since the claim did not assert a

violation of the Act or a tariff. *Id.* at 664. Rather, the fact that Cities Services sued to enforce its side agreement with Pan American was decisive. *Id.* Accordingly, the Court held it did not appear on the face of the complaint that the claim depended upon determination of a question of federal law. *Id.* at 663.[11]

The Court further held the Natural Gas Act's exclusive jurisdiction provision would not make a non-federal claim federal, stating: "Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction . . . ." *Id.* at 664. The Court noted this rule "was settled long ago" in *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255 (1897), in which the Court found federal jurisdiction lacking because the invalidity of certain patents arose only in defense to the complaint asserting common law breach of contract. In that opinion, the Court held, as quoted in *Pan American*, "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading . . . sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction." *Id.* at 259.

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[11] The Court cited *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), another case in which state law claims did not implicate any violation or enforcement of the Natural Gas Act, a FERC order or a FERC-approved tariff. In *Skelly Oil*, the contract underlying the breach of contract claim was a collateral contract that did not incorporate or implicate the terms of a FERC-approved tariff. *Id.* at 669.

Thus, in both *Pan American* and *Pratt*, the Court focused on whether the well-pleaded complaints alleged claims to enforce rights or obligations created by a comprehensive federal regulatory scheme, not on whether the claims met the as-yet unarticulated *Merrell Dow* and *Grable & Sons* "arising under" test. This test is too broad to give effect to Congress' clearly stated intent that federal courts exclusively resolve claims to enforce rights and obligations created by the Natural Gas Act and FERC-approved tariffs. In light of Section 24, a state court cannot be called upon to resolve matters Congress intended to exclude from the states' jurisdiction.

CONCLUSION

For the foregoing reasons, the decision by the Third Circuit below should be reversed.

Respectfully Submitted,

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